SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 1069

FRED OLSEN LINE, a corporation, A/S GANGER ROLF, A/S BORGA and A/S BONHEUR,

Petitioners,

vs.

MADELINE CURRY, Administratrix of the Estate of Jack Curry, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
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October Term, 1966

No.

Fred Olsen Line, a corporation, A/S Ganger Rolf, A/S Borga and A/S Bonheur,	*Petitioners,*
vs.	
Madeline Curry, Administratrix of the Estate of Jack Curry, Deceased,	*Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case October 10, 1966, as to which rehearing was denied November 18, 1966.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of California is reported at 1965 A.M.C. 1358 and set forth in the Appendix, *infra*. The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 367 F.2d 921 and set forth in the Appendix, *infra*.

JURISDICTION

On October 10, 1966, the Court of Appeals entered its Judgment (R. 46) of the same date reversing the final Judgment of the District Court (R. 16) which had denied damages for wrongful death to the personal representative of a longshoreman on the basis of a partial summary judgment (R. 14) as to the unseaworthiness count of the Complaint and a jury verdict on the negligence count. Petitioners filed a timely Petition for Rehearing which was denied by an Order dated November 18, 1966 (R. 47). The jurisdiction of this Court is invoked under 38 U.S.C. 1254 (1).

QUESTION PRESENTED

Should a uniform admiralty rule be applied to cases of death in navigable waters of the United States with respect to grounds of recovery and the effect of contributory negligence and other defenses.

STATEMENT OF THE CASE

This action was brought by Respondent, as Administratrix of the Estate of Jack Curry, to recover damages for his death from Petitioners, the owners of a vessel on which he was working as a longshoreman at the time. The Amended Complaint (R. 1) alleged that the accident occurred on navigable waters of the United States within the State of California and was caused by (1) negligence of the vessel owners and (2) unseaworthiness of the vessel.

In addition to a denial of these charges the Answer (R. 4) set up the deceased's own negligence, as a bar to recovery under California law.

Petitioners moved for a partial summary judgment dismissing the unseaworthiness count of the Amended Complaint (R. 10). The District Court granted the motion and rendered a partial summary judgment for Petitioners with respect to the unseaworthiness count (R. 14; Appendix i). The case was then tried on the negligence count, under California law, and the jury returned a general verdict for Petitioners and a special verdict that the death of Curry was caused by his own negligence (R. 15). Judgment for the vessel owners was entered accordingly (R. 16).

In the Court of Appeals, Respondent attacked only the partial summary judgment eliminating the unseaworthiness count (R. 32; Appendix iii), urging that the California limits upon the grounds of recovery should not be adopted by the maritime law (R. 35; Appendix vii) and, in the alternative, that the California statute was broad

enough to embrace unseaworthiness as a ground (R. 36; Appendix viii). In addition to arguing the correctness of the ruling below that unseaworthiness was not a ground of recovery under the California law upon which Respondent had relied and urging a rule parallel to that which applies to seamen, Petitioners pointed out that the case appeared to be disposed of by the jury's specific finding that Curry's death was caused by his own negligence (R. 43). The correctness of the verdict and Judgment on the negligence count were not in issue (R. 32).

The Court of Appeals reversed (R. 46). While noting the divergence of views among Justices of this Court in recent cases, it rejected the argument for a uniform standard and held that the case was governed entirely by California law (R. 35; Appendix vii). Differing with the two California District Judges and the two California Superior Courts which had passed on the question, the Court of Appeals predicted that, despite the difficulties presented under the California statutes and decisions, the California Supreme Court would allow an action for wrongful death to be based upon unseaworthiness. The Court of Appeals acknowledged that, under California law, contributory negligence of the decedent would be a bar to the action, so far as it was grounded upon negligence, but predicted that, despite the present California rule in negligence cases, the California Supreme Court would apply the comparative negligence doctrine to the unseaworthiness count of a wrongful death action (R. 32-45, Appendix iii-xx).

A Petition for Rehearing was filed, pointing out that the Court had grounded its decision upon points not urged

or discussed by either of the parties. It was particularly urged that the effect of decedent's contributory negligence should not produce contrary results with respect to the negligence and unseaworthiness counts of a complaint because this Court has repeatedly held that the two counts, sounding in negligence and unseaworthiness, present but a single cause of action[1] and because it is impossible for a jury, or indeed a court, to apply two different contributory negligence rules to a single cause of action. The Petition was denied without discussion (R. 47).

REASONS FOR GRANTING THE WRIT

The writ should be granted because the Court of Appeals has decided an important question of Federal Law which, although it has been decided in the past by this Court by shifting and dissatisfied majorities, does not appear to have been settled and should be. While it cannot be said that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals upon the precise question presented by this Petition, the Court of Appeals, under the present disposition of that question, are sharply in conflict with respect to the interpretation of comparable State death acts, as they apply to maritime death cases. The uniformity of admiralty law has consequently been shattered in respect of death cases.

In *The Tungus*, 358 U.S. 588, 1959 A.M.C. 813, this Court had to consider to what extent New Jersey Law

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[1] *Baltimore Steamship Company v. Phillips*, 274 U.S. 316, 1927 A.M.C. 946; *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 1958 A.M.C. 1754.

governed the right to recover for the death of a longshoreman killed on a vessel in navigable waters of the United States within the state of New Jersey. A majority of the Court reached the conclusion that the State wrongful death statute must be applied with "whatever conditions and limitations the creating State has attached."[2] In a forceful opinion, Mr. Justice Brennan, joined by three other members of the Court, differed with the majority as to the application of State law, deploring the effect of the rule upon the uniform character of the Maritime Law and saying:

> "A proper uniformity on essential matters of maritime cognizance . . . cannot be reached by making availability of this remedy dependent upon exegesis of the statute of each State."[3]

Mr. Justice Brennan urged that a proper rule would leave substantive standards under Federal control while referring to State law for its remedial features with respect to the determination of proper parties to sue and the distribution of funds. As was said in the conclusion of the opinion:

> "Admiralty Law is primarily judge-made law. The Federal Courts have a most extensive responsibility of fashioning rules of substantive law in Maritime cases. . . . This responsibility places on this Court the duty of assuring that the product of the effort be coherent and rational."[4]

A year after the decision in *The Tungus,* this Court decided *Hess v. United States,* 361 U.S. 314, 1960 A.M.C.

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[2] 358 U.S. at 592, 1959 A.M.C. at 16.
[3] 358 U.S. at 608, 1959 A.M.C. 829.
[4] 358 U.S. at 611, 1959 A.M.C. 831.

527, and *Goett v. Union Carbide Corp.*, 361 U.S. 340, 1960 A.M.C. 550. The *Hess* case presented the question whether an Oregon statute applying a standard of care much more stringent than the maritime standards of ordinary care and seaworthiness should be applied in a maritime death case. This Court held that it should. The *Goett* case concerned the application of the West Virginia wrongful death statute to a maritime case and this Court remanded to the Court of Appeals for clarification of the standards it had applied. In addition to the question whether the West Virginia statute embraced unseaworthiness as a ground of recovery, the *Goett* decision raised new and more refined questions as to whether the West Virginia statute, in making negligence a ground of recovery, referred to the Federal maritime standard of negligence or to a differing State standard and whether, if the statute embraced the idea of unseaworthiness as a ground of recovery, it would refer to the Federal standard or to some peculiar State standard of seaworthiness.

In this increasingly confused state of affairs the members of this Court who had dissented in *The Tungus* explained their joining with the majority in *Hess,* as follows:

> "The Chief Justice, Mr. Black, Mr. Justice Douglas and Mr. Justice Brennan join the opinion of the Court, but solely under compulsion of the Court's ruling in *Tungus v. Skovgaard,* 358 U.S. 588. They believe that as long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that State law is the measure of recovery when it helps the defendants, as in *Tungus,* and is not the measure of

recovery when it militates against the defendant as it does here.

However, they note their continued disagreement with the ruling in *Tungus,* and reserve their position as to whether it should be overruled, particularly in the light of the controversy application of it has engendered among its original subscribers. See the various separate opinions in this case and in *Goett v. Union Carbide Corp.*"[5]

The questions raised in *Goett* and the holding in *Hess* which dissatisfied the majority of the Court only presaged further disuniformity and disorder in the development of the law under the *Tungus* rule.

In *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 1965 A.M.C. 1 (1964), this Court emphatically reaffirmed a statement made in *Lindgren v. United States,* 281 U.S. 38, 1930 A.M.C. 399, "precluding any possible recovery based on a theory of unseaworthiness"[6] from the shipowner in seamen's death cases. Thus the basis of recovery in seamen's death cases was restricted to negligence, as in the cases of passengers and visitors generally.[7] Only with respect to longshoremen's and harbor workers' cases, deriving their rule from analogy to the rights of seamen, does unseaworthiness remain available as a ground, and then only upon a spotty and somewhat unstable basis, depending upon the State where death occurred and whether the Federal court can rely upon a definitive State-

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[5]361 U.S. at 321, 1960 A.M.C. at 535.

[6]379 U.S. at 154, 1965 A.M.C. at 6.

[7]See *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 629, 1959 A.M.C. 597, 600.

court construction or must undertake prediction of the State rule.

With respect to the consequences of the deceased's contributory negligence, the same irrational disuniformity prevails. In the greater number of reported decisions the State laws have been interpreted as barring recovery on maritime death claims where contributory negligence of the decedent is shown.[8] Some courts, however, construing a similar range of State laws, have held that the maritime standard of comparative negligence would be adopted by the States for application to maritime deaths.[9] Perhaps the ultimate confusion is presented by the present case, where California law is interpreted by the Court of Appeals (in accordance with State rulings) to recognize contributory negligence as a bar to the negligence count, while (without any State guidance) the comparative negligence rule is held to apply to the unseaworthiness count (R. 43-45; Appendix xvii-xx). Such treatment does violence to the principle that the two counts constitute but one cause of action and presents an impossible situation to the jury, when contributory negligence is found.[10]

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[8]Cases collected in Footnotes 35, 36, 37 and 38 of the Opinion of the Court of Appeals (R. 44-45; Appendix xix).

[9]Cases cited in Footnote 34 of the Opinion of the Court of Appeals (R. 44; Appendix xix) and also *Vassallo v. Nederl-Amerik Stoomv Maats Holland,* 162 Tex. 52, 344 S.W. 2d 421 (1961) (Tex. law).

[10]*Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 1927 A.M.C. 946; *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 1958 A.M.C. 1754. In the *McAllister* case it was held that a State statute of limitations could not be applied to the unseaworthiness count short of the time allowed by Congress for the negligence count since the two counts presented but one cause of action which would thus be barred short of the period provided by Federal law. By parity of reasoning, the bar of contributory negligence could scarcely be applied to one count alone.

The treatment of State statutes of limitations makes its contribution to the irrational pattern of results under the *Tungus* rule. In *Western Fuel Co. v. Garcia,* 257 U.S. 233 (1921), it was held that the California one-year statute of limitations applied to a suit for a longshoreman's death on a vessel in San Francisco Bay. Thus the time available for suit in such cases varies widely throughout the country, depending upon the divergent statutes of limitations of the several States. Perhaps no case brings the substantive disarray into sharper focus than *Allen v. United States,* 338 F.2d 160, 1965 A.M.C. 709 (9th Cir. 1964), in which it was held that the California one-year statute must be applied even to a suit against the United States under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.,* which provides its own two-year limitation period for suit.

The substantive disuniformity is matched by the actual and potential procedural disorder produced by the decisions of the last few years. A review of the numerous reported cases quickly shows that the majority of interpretations of State law in this area are being made by the Federal courts unguided by State decisions[11] and subject at any time to being disregarded by the lower State courts and overruled by the upper ones, so that grave uncertainty exists about the law in many maritime States, despite the published holdings. In construing the language of various

[11]See the cases collected in Footnotes 28, 36, 37 and 38 of the Opinion of the Court of Appeals (R. 42, 45; Appendix xvi, xix). The Court of Appeals stated (R. 45; Appendix xix) that *Graham v. A. Lusi, Ltd.,* 206 F.2d 223, 1953 A.M.C. 2161 (5th Cir.) "involves a statute that has been held by state [Florida] courts not to confer a cause of action for unseaworthiness". It is unlikely that the Court in *Graham* relied on this information since the source of it does not appear from the Florida cases referred to.

State death acts which do not differ significantly for this purpose, the Courts of Appeals have reached sharply conflicting results as to the availability of unseaworthiness as a ground of recovery[12] and the effect of contributory negligence.[13] The resulting disorder and temptation toward forum-shopping are again best illustrated by the present case, under which the Federal courts in California are constrained to one interpretation of California law, while the two California Superior Courts handling the bulk of State-court maritime litigation hold to the contrary.[14]

So far as this Court is concerned, the present pattern had its genesis in *The Harrisburg,* 119 U.S. 199 (1886) when the right to recover for wrongful death was still novel and far from universal and this Court's view of its function in "fashioning rules of substantive law in Maritime cases" was more limited than it later became. With

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[12]Compare the Opinion of the Court of Appeals in the instant case (construing "wrongful act or neglect") with *Emerson v. Holloway Concrete Products Company,* 282 F.2d 271, 1961 A.M.C. 1484 (5th Cir. 1960) (construing "wrongful act, negligence, carelessness or default of any ship, vessel, or boat"). Compare also *Dalehite v. United States,* 346 U.S. 15, 44-45, 1953 A.M.C. 1175, 1197, where this Court held, in a maritime case, that "negligent or wrongful act" in the Federal Tort Claims Act does not embrace any species of liability without fault.

[13]Compare the Federal cases cited by the Court of Appeals in Footnotes 34-38 (R. 44-45; Appendix xix). The distinctions drawn by the Court of Appeals depend, in most instances, on the unsupported assumption that the States involved would apply different contributory negligent rules to the negligence and unseaworthiness counts.

[14]See Footnote 10 of the Opinion of the Court of Appeals (R. 36; Appendix vii). *Smith v. Union Oil Company,* referred to there, was appealed on other grounds but the nonsuit on unseaworthiness was not challenged. *Smith v. Union Oil Company,* 241 A.C.A. 431, 50 Cal. Rptr. 499 (1966).

wrongful death statutes available in every State, the existence of a right of recovery for wrongful death has long since become a customary standard of our law. It is well within the power and practice of this Court to fashion uniform admiralty wrongful death rules in harmony with those already contributed to this field by Congress. A large and respectable body of opinion finds great difficulty with the operation of the *Tungus* rule.[15] It is time for the rule to be reexamined in order to restore a "coherent and rational" uniformity to admiralty law.

CONCLUSION

This case affords the Court an opportunity to fashion a uniform Federal rule for admiralty death cases, and to define those subsidiary rules—primarily on statutes of limitations and the effect of contributory negligence—which should also be controlled by the uniformity of ad-

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[15] *Anthony v. International Paper Co.*, 289 F.2d 574, 1961 A.M.C. 1890 (4th Cir.); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 47, 1961 A.M.C. 1469, 1474, n. 6 (5th Cir. 1960); *Union Carbide Co. v. Goett*, 278 F.2d 319, 1960 A.M.C. 1125 (4th Cir.); *Grigsby v. Coastal Marine Service, Inc.*, 235 F. Supp. 97 (W.D.La. 1964); Currie, *Federalism and the Admiralty*, 1960 *Supreme Court Review* 158, 193-202; Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 *Colum. L. Rev.* 648 (1964); Harolds, *Maritime Death Claims and the Applicability of State Law*, 35 *Tul. L. Rev.* 85 (1960); Roberts, *Maritime Law: Oregon Employers' Liability Act*, 27 *Ins. Couns. J.* 474 (1960); Verleger, *An Introduction to Liability for Death on Inland Waters, ABA Sec. of Ins., Negl. and Comp. Law, 1965 Proceedings* 497, 509-13; Note, 39 *Tex. L. Rev.* 643 (1961); Comment, 73 *Harv. L. Rev.* 148 (1959); Comment, 45 *Iowa L. Rev.* 936 (1960); Comment, 58 *Mich. L. Rev.* 1063 (1959); Comment, 32 *Temp. L. Q.* 455 (1959); Comment, 28 *U. Chi. L. Rev.* 346, 355 (1961); Comment, *U. Miami L. Rev.* 95 (1960); Comment, 108 *U. Pa. L. Rev.* 899 (1960).

miralty. Petitioners therefore submit that a writ of certiorari should be granted and that the important question presented should be examined and settled in the light of the decisions, the experience and the writings of recent years.

Respectfully submitted,

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(Appendix Follows)